IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943.

No. 317

CRITES, INCORPORATED,
petitioner,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, RICHARD SIMKINS AND GEORGE FLORENCE,
respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITIONER'S BRIEF

ISAAC E. FERGUSON
77 West Washington Street
Chicago 2, Illinois,
attorney for petitioner.

NATHAN HAFFENBERG
JOSEPH ROSENBAUM
100 West Monroe Street
Chicago 3, Illinois,
of counsel.

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PETITIONER'S BRIEF

Opinion of the court below.

No written opinion was filed by the district court.* The opinion of the circuit court of appeals appears in the record at pages 387 to 393 and is reported in 134 F. 2d 925.

Jurisdictional statement.

A writ of certiorari was granted by this court November 8, 1943, pursuant to section 240 (a) of the Judicial Code, as amended by act of February 13, 1925 (28 U.S.C., § 347 [a]).

* The exceptions to the receivers' accounts were passed upon by Judge Underwood. In the earlier stages of the litigation, Judge Hough presided (until his death in 1935).

STATEMENT OF THE CASE.

Judgment.

The judgment of the circuit court of appeals affirmed (with one modification) the order of the district court approving the accounts rendered by George Florence and Richard Simkins, as receivers appointed by the court in 22 consolidated foreclosure suits, and overruling all of petitioner's exceptions to the receivers' reports. (Order of district court—R. 371.)

In the circuit court of appeals, petitioner pressed its objections to the following items in the receivers' accounts:

(1) Failure to surcharge one of the receivers, Richard Simkins, for the compensation received by him from Edwin Jones, in connection with the purchase by Jones (for Col. Proctor) of the 11 mortgaged farms situated in Madison County, Ohio, pursuant to a contract of purchase made with Prudential Insurance Company prior to the sale of these farms under the foreclosure decrees.

(2) Failure to surcharge said receiver with the commission or profit made by Jones in said transaction.

(3) Failure to surcharge said receiver with the profit made by the Prudential Insurance Company in said transaction (*i.e.*, the excess over the mortgage decree indebtedness received by Prudential in the resale of these 11 farms).

(4) Failure to surcharge said receiver with the amounts received by him from O. C. Ingalls, one of the attorneys for the plaintiff (Prudential), pursuant to a fee-splitting agreement between said receiver and said attorney.

(5) Failure to surcharge said receiver for $250 previously allowed to him by the court on account of his fees, also the additional sum of $1800 taken by him on account of fees without formal court order.

(6) Allowance of credits taken by said receiver for expenses in a lump sum per month, without proof of his actual expenses.

(7) Allowance of credits for sums paid to the law firm of Abernathy & Simkins for stenographic expenses.

The foreclosure suits were filed February 17, 1932 by Remy, Harrison & Remy, of Indianapolis, and Ingalls & Selby, of Columbus, as attorneys for Prudential Insurance Company. (R. 8.) On the same day the receivers were appointed. (R. 10.) March 3, 1932 an order was entered, on *ex parte* application by the receivers, appointing the attorneys for the plaintiff as attorneys for the receiver. (R. 11-13, last paragraph.)

By orders entered January 17, 1933 a partial allowance of $250 on account of services was made to each of the receivers and each of the attorneys. (R. 20.) February 19, 1937 one of said attorneys, O. C. Ingalls, filed an application for allowance of $1200 additional compensation for services claimed to have been rendered as attorney for the receivers. (R. 33.) Objection to this application was made by the plaintiff (Prudential), whom Ingalls was still representing as attorney in these foreclosure suits. (R. 47.) Objection to any fee allowances to the receivers or their attorneys was made by the defendant Crites, Inc., as part of its exceptions to the receivers' accounts. (R. 52, ¶ 12.) The Ingalls fee application was referred to the special master, together with the receivers' accounts, and the master found that many of the items included in Ingalls' statement of services consisted of services for Prudential and not for the receivers, therefore were not chargeable to the receivership estate. (R. 105.) Before the court acted on the master's report, Ingalls withdrew his pending application for fees and substituted a new application (May 25, 1939) for compensation in the sum of $2500. (R. 356.) To this substituted application, Prudential filed no objection, but objections were filed by the defendant Crites, Inc. (R. 364.) A memorandum was filed by the district judge on March 12, 1940 finding that Ingalls, since

the date of the $250 fee allowance of January 17, 1933, had rendered additional services as counsel for the receivers of the reasonable value of $275. (R. 366.) On April 8, 1941, notwithstanding the memorandum filed March 12, 1940, the court entered an order making an additional fee allowance of compensation to Ingalls, as one of the counsel for the receivers, in the sum of $2200. (R. 368.) Because the funds otherwise available were insufficient to pay the fees allowed to Ingalls, the special master and the court reporter, the Prudential Insurance Company was ordered to pay the deficiency. Thereupon Prudential filed a motion to retax the costs taxed against it by the order dated April 8, 1941. (R. 370.) No order has as yet been entered by the district court on plaintiff's motion to retax costs.

The circuit court of appeals affirmed the order of the district court overruling all of petitioner's exceptions to the receivers' accounts. However, because of the fee-splitting arrangement between Ingalls and Simkins, also because of the impropriety of accepting appointment as attorney for the receivers while serving as attorney for the plaintiff, the circuit court of appeals declared that no additional attorney fees should be allowed to Ingalls (or Harrison, who was not asking for any additional fees as one of the attorneys for the receivers). (R. 392-393.)

Facts.

The plaintiff filed simultaneously 22 foreclosure suits, but only 11 of these suits are involved in this appeal, these 11 suits covering contiguous farms in Madison County, Ohio. The mortgages on these 11 farms, aggregating $192,000 (R. 2, 9), were made to Prudential Insurance Company on October 17, 1929 and were matured by acceleration on December 30, 1931. (R. 3.)

The opinion of the circuit court of appeals fails to show that, while these 11 farms were mortgaged to Prudential for $192,000, an offer to purchase these farms for $500,000 was made to Henry M. Crites by Edwin Jones, representing J. C. Penny of New York. (R. 201.)

No answers to the foreclosure complaints were filed by any of the defendants and an order defaulting the defendants for want of answer and decrees *pro confesso* could have been entered at any time after April 20, 1932. (R. 24.) However, as testified by George Florence, one of the receivers, the district judge was then of the opinion that the farms should continue to be operated by the receivers for another year, that he thought times would be better and the farms would sell better. (R. 128.) Accordingly, the decrees *pro confesso* were not entered until May 2, 1933 and by these decrees it was ordered that in default of payment by any of the defendants of the decree indebtedness the farms should be sold by the United States marshal on July 1, 1933, at public sale, for cash at not less than two-thirds of the appraised value. (R. 24-25.) The decree indebtedness in the 11 cases here involved (afterwards consolidated for hearing on the receivers' accounts) was $223,742.32. (R. 24-26.)

The appraisers appointed by the marshal filed their appraisement on May 17, 1933, at aggregate valuation of $244,080 for the 11 farms. (R. 26.) Thus, the minimum bids at which the 11 farms could be sold by the marshal aggregated $162,720. On June 27, 1933, unknown to the defendant Crites, Inc., or to the district court, a contract for the purchase of the 11 farms from Prudential was signed by Edwin Jones. This contract called for a deed of general warranty conveying the farms free and clear of all encumbrances, except certain taxes, said conveyance to carry "the company's undivided one-half interest in the growing crops thereon in accordance with the existing lease

thereon," Jones to pay the sum of $249,106 net to Prudential. (R. 61.) The signature of Jones was witnessed by Richard Simkins, also by Simkins' secretary, Marion R. Lutz. (R. 63, 193.)

The contract was made in contemplation of the acquisition of title to the farms by Prudential as purchaser at the foreclosure sales to be held July 1, 1933. Earnest money of $3,000 was deposited by Jones with Prudential. (R. 212, 213.) When the contract was signed by Jones he handed it to Simkins and Simkins transmitted it to Prudential. (R. 288.) From this letter it appears that Jones was not buying the farms for himself, but for a principal whose identity had been disclosed to the representatives of Prudential.

There is some uncertainty in the testimony about the time of the negotiations between Jones and Prudential. Jones testified that he first talked with Vance Simerman, of Prudential Insurance Company, about a purchase of the Madison County farms and that Simerman told him he was in no position to talk about it now, that they did not have the farms and were not in any position to sell. (R. 202, 204, 205.) Then, about four or five weeks before the foreclosure sales, Jones called on Simkins, whom he had known for fifteen or twenty years, and had a conversation with Simkins regarding purchase of the Madison County farms.

> "I went to see him and told him that he was one of the attorneys in the matter, and I was interested in trying to buy it, he told me 'we are in no position to offer it right now, not in position until after the foreclosure proceedings and the Prudential Insurance Company acquires title for it, then they would be in position to offer it to anybody else trying to buy it.' I told him that I would like to have him intercede for me if he would, and it was at my suggestion that I told him that, and he said he would do what he could for me, so that was about the end of that." (R. 206.)

Some kind of a written contract was made to evidence the arrangement between Jones and Simkins, but a copy of this contract was never produced. (R. 207.) Jones said that he did not know how much he was to pay Simkins; but that he was to pay Simkins "for his services in helping me in getting this farm, acquiring the farm, and any other services in the way of legal work" (R. 207); that his arrangement with Simkins was conditional and he was not to pay anything to Simkins unless he secured these Madison County farms. (R. 208.)

The principal whom Jones represented was Col. Cooper Proctor. The record does not show directly the amount agreed to be paid and ultimately paid by Proctor for the 11 farms, but the documentary tax stamps on the deed from Prudential to Proctor's nominee, Mary E. Johnston, indicated payment by Proctor of approximately $281,000 (R. 346); presumably, $249,106 net to Prudential, in accordance with the Jones-Prudential contract of June 27, 1933; and the difference of $31,894 to Jones. (See testimony of Jones about payments received by him from Proctor—R. 219.)

At the foreclosure sales held July 1, 1933, the only bidder for the Madison County farms was the mortgagee, Prudential Insurance Company. (R. 267.) The bids of Prudential on the 11 farms aggregated $163,900 (R. 32), or slightly more than the upset price of $162,720 (representing two-thirds of appraised value). In the opinion of the circuit court of appeals it is stated as an absolute matter of fact that Proctor was not a prospective bidder at the marshal's sale (R. 389); and that although Jones was present at the marshal's sale, he did not bid because he lacked authority to do so. (R. 390). All that appears in the record in support of these assertions is the testimony of Jones himself that he was not authorized by his prospective purchaser to buy the 11 Madison County farms aggregating 4,844 acres, except as a whole. (R. 220.) However, Jones further

testified that he never told Simkins and the Prudential Insurance Company he was only interested in buying the 4,844 acres as a unit. (R. 221.)

By force of the contract made with Prudential on June 27, 1933, under which he was bound to take the 11 farms from Prudential at net price of $249,106, Jones had cut himself off as a possible bidder at the foreclosure sales. What Jones or Proctor might otherwise have done, if this contract had not been made, seems to rest entirely in argument and speculation.

In contrast with the dealings between Simkins, Jones and Prudential, the evidence shows that prior to the foreclosure sales another prospective purchaser wrote a letter to Prudential inquiring whether the Madison County farms could be purchased at private sale, but at a price unattractive to Prudential. In this instance, the answer was that Prudential did not own the property and was in no position to make any sale, that any sale would have to be worked out with the owner of the equity, Crites, Inc. (R. 271.)

It is stated in the opinion of the circuit court of appeals: "Jones paid Simkins a total of $2,797, although part of it was not on account of the Proctor transaction but for other legal services Simkins had performed for Jones." (R. 390.) Simkins testified that on July 3, 1933 Jones paid him $500; on July 8, $1,000; on August 18, when the deal with Proctor was closed, $1,297; that there was a small debt due to him from Jones for services separate from the farms, but not to exceed a maximum of $200, and that the balance represented fees paid to him in connection with the Madison County farms. (R. 273-274.)

Further, the circuit court of appeals states: "Jones and Simkins entered into an agreement by which Jones engaged Simkins to represent him as his attorney in consummating the purchase, his compensation, however, to

depend on whether or not the deal would be completed." (R. 390.) Reference has already been made to the testimony of Jones regarding the nature of Simkins' employment (*supra*, p. 6). Simkins himself testified that he did not examine the title; that Proctor was represented in the transaction by the law firm of Dinsmore, Shohl & Sawyer of Cincinnati. (R. 149.) On cross-examination Simkins was asked: "How do you justify a fee of $2,000 or $3,000 paid to you by Mr. Jones?" He answered: "That is none of your business. I negotiate the fees with my clients and fix the fees in my office to suit myself." (R. 159.)

The fee-splitting agreement.

The foreclosure suits were filed at Columbus, Ohio. O. C. Ingalls, of Columbus, testified that he was retained as attorney for the plaintiff originally by Richard Simkins, of Circleville, Ohio, and later by Davis Harrison, of Indianapolis, Indiana. (R. 109.) Simkins had over a period of years represented the Prudential Insurance Company as attorney in various foreclosure matters (R. 137-138); likewise Davis Harrison (R. 221-222). Ingalls said that Simkins told him that there was to be an application for the appointment of a receiver for the Crites farms; that he (Simkins) was to be appointed the receiver, and that Ingalls was to be appointed one of counsel for the receiver. (R. 109.) On the subject of fees, we quote the following from Ingalls' testimony:

"Q. Did you have any understanding with Mr. Simkins as to the participation of fees received either by you or him?

"A. We had an agreement when we entered into the case that we would divide the fees in this case.

"Q What do you mean by that, 'divide the fees in this case'?

"A I presume that he expected to be appointed receiver, and he would receive certain fees direct, and I would receive a fee as attorney for the receiver, and we would pool those fees.

"Q You mean by that, Mr. Ingalls, that any fees received in or arising out of this case would be pooled or divided between you?

"A That is what I assumed." (R. 113-114.)

Soon after the institution of the foreclosure suits, Ingalls received from Prudential "an advancement" of $50 per case for each of the 22 cases, or $1100. (R. 113.) Of this retainer of $1100, one-half was turned over by Ingalls to Simkins. (R. 113, 279.) The only further fee received by Ingalls in these foreclosure cases was the $250 allowed by the court in partial compensation for his services as counsel for the receivers, at which time Simkins was also allowed $250. (R. 20.)

It does not appear that Simkins reciprocated by dividing with Ingalls the additional fees of $1800 which he paid to himself on account of his services as receiver, or any part of the $2,797 that he received from Jones. However, in response to a request from Harrison for a share of his fees, Simkins made payments to Harrison of $200, $300 and $500, the latter payment on August 18, 1933, the day when Simkins received his final payment from Jones. (R. 222, 234-235, 274, 311-312.)

Specification of errors to be urged.

(1) The circuit court of appeals erred in affirming the order of the district court overruling all of petitioner's exceptions to the receivers' accounts (except, in part, the exceptions to any allowance of compensation to the receivers' attorneys).

(2) The circuit court of appeals erred in not directing the district court to surcharge the receiver Simkins with

(a) the money received by Simkins from Jones, (b) the commission or profit received by Jones, (c) the amount received by Prudential in excess of the decree indebtedness, or at least the amount by which the appraised value of the Madison County farms exceeded the decree indebtedness.

(3) The circuit court of appeals, although it held that Ingalls should be punished by denial of further compensation, erred in failing to direct the district court to require Simkins to refund all fees allowed or taken by him out of the receivership estate.

SUMMARY OF THE ARGUMENT.

I.

Simkins breached his duty as receiver by accepting employment from Jones (Proctor's agent), in advance of the foreclosure sales, to help bring about a sale of the Madison County farms by Prudential Insurance Company to Proctor.

Jackson v. *Smith*, 254 U.S. 586, 41 S. Ct. 200, 65 L. ed. 418.

Nugent v. *Nugent* (1907) 2 Ch. 292, 76 L. J. Ch. 614; affd. (1908) 1 Ch. 546, 77 L. J. Ch. 271.

In re Sheets Lumber Co., 52 La. Ann. 1337, 27 So. 809, 812.

Shadewald v. *White*, 74 Minn. 208, 77 N. W. 42.

Donahue v. *Quackenbush*, 62 Minn. 132, 64 N. W. 141; 75 Minn. 43, 77 N. W. 430.

Cook v. *Martin*, 75 Ark. 40, 45; 87 S.W. 625, 627.

Baker v. *Schofield*, 243 U.S. 114, 118, 61 L. ed. 626, 631.

A. The district court and the circuit court of appeals erroneously concluded that, because the foreclosure sales were conducted by the marshal and not by the receivers, there was no conflict between the personal interest of Simkins as associate broker and his fiduciary obligations as receiver.

B. By accepting employment as associate broker, it became a matter of personal advantage to Simkins to see that Prudential was the successful bidder at the foreclosure sales, at whatever price Prudential might choose to bid; whereas, in his official capacity as receiver, it was the duty of Simkins to bring to the attention of the court and all the parties information that might affect their

interests and not to make himself the secret ally of the mortgagee as against the owner of the equity.

C. It was obviously of vital importance to the owner of the equity—and to the court which had the sales in charge—to be informed prior to the foreclosure sales of the identity of a prospective buyer willing to pay approximately $281,000 for the 11 farms ($249,106 to Prudential and the balance to Jones).

D. To argue, after the event, that such disclosure would have served no practical purpose and that even with such disclosure Prudential would nevertheless have bid in the farms for $163,900, or $60,842.32 less than the decree indebtedness, is to indulge in unwarranted surmise and speculation in contravention of the receiver.

American United Mutual Life Ins. Co. v. *City of Avon Park*, 311 U.S. 138, 146, 85 L. ed. 91, 96.
Woods v. *City National Bank & Trust Co.*, 312 U.S. 262, 268, 85 L. Ed. 820, 825, 826.

E. The foreclosure sales, as a result of the pre-arrangement to which Simkins was an accessory, became a medium by which Prudential made a profit of $25,363.78 above the aggregate decree indebtedness and Jones a profit of approximately $31,000 (in which Simkins admittedly participated to the extent of $2,797).

F. Simkins is severally liable to petitioner for the profit in excess of the decree indebtedness realized by Prudential Insurance Company and by Jones and by himself.

Jackson v. *Smith*, 254 U.S. 586, 589.

II.

Prudential contracted with Jones to sell its interest (meaning the receivers' interest) in the growing crops, as well as the land, and as to the growing crops Simkins was in the position of a fiduciary-owner.

A. By virtue of the employment which Simkins accepted from Jones, it became a matter of personal interest to Simkins to help Prudential acquire the title to the receivers' interest in the growing crops, as well as the title to the land, otherwise he would not have received any compensation for his services as associate broker.

B. The transaction with respect to the growing crops further illustrates the position of partiality assumed by Simkins in favor of Prudential and against the petitioner.

C. The law will not permit a fiduciary to occupy such a position of conflicting interest, regardless of the alleged merits or demerits of the particular transaction.

See cases cited under point I.

Earll v. *Picken* (Ct. App., D.C.), 113 F. 2d 150, 155-158.

Woods v. *City National Bank & Trust Co.*, 312 U.S. 262, 268-269, 85 L. ed. 820, 825-826.

In re Marquette Manor Bldg. Corp. (C.C.A. 7), 97 F. 2d 733, 735 (cert. den. 305 U.S. 648).

III.

The fee-splitting agreement between Ingalls, attorney for the plaintiff and for the receivers, and Simkins, one of the receivers, called for disallowance of compensation to Simkins out of the receivership estate.

Weil v. *Neary*, 278 U.S. 160, 172, 73 L. ed. 243, 250.
Woods v. *City National Bank & Trust Co.*, 312 U.S. 262, 269, 85 L. ed. 820, 826.

A. The circuit court of appeals incongruously held that Ingalls should be denied the additional compensation of $2200 awarded to him by the district court, yet at the same time permitted Simkins to retain the $250 fee originally allowed to him by the court and the additional $1800 subsequently taken by him on account of fees without formal court order.

ARGUMENT.

I.

The Simkins-Jones deal.

When Simkins, erstwhile lawyer for Prudential Insurance Company, was appointed by the district court as one of the two receivers in the foreclosure suits, he became charged with fiduciary obligations to the mortgagors and their assignee, Crites, Inc., as well as to the mortgagee, Prudential Insurance Company. But the circuit court of appeals, we respectfully urge, pays only lip homage to this proposition and emasculates it by too narrow delimitation of the receivers' obligations. It is argued that the receivership was confined to the operation and management of the mortgaged farms and that the receivers had no duties or obligations with respect to the sale. We find no such exact divisibility of purpose in the orders of the district court, but rather a single purpose to administer and liquidate the trust property in the manner most beneficial to all parties concerned.

A controlling fact of the case, ignored by the circuit court of appeals, is that the district court purposely delayed entry of the decrees of foreclosure and permitted the receivership to continue for another year in the hope that times would be better and the farms would sell better (*supra*, p. 5). Obviously, the benefit of better times and a better sale would inure to the owner of the equity rather than the mortgagee, since the mortgagee could always protect itself by bidding in the properties at the foreclosure sales if satisfactory bids were not made by outsiders. Apparently the decision of the court to defer entry of decrees of sale was made upon consultation with at least one

of the receivers, George Florence (*supra*, p. 5), but the evidence fails to show upon what representations the court finally decided to permit the mortgaged farms to go to sale on July 1, 1933. It is to be noted, however, that the co-receiver (George Florence) then was uninformed of the transaction between Proctor, Jones and Prudential Insurance Company, or of the interest of Simkins in this transaction. (R. 133, 134.)

The circuit court of appeals says that one occupying a fiduciary relation may not purchase or be interested in the purchase of the trust property for his own benefit; but that, "where the sale of trust property is made pursuant to a decree of the court, by a special commissioner or other agent appointed by the court, the fiduciary has the right and privilege of purchasing." (R. 391.) The argument is that, in the present case, Simkins was not a liquidating receiver and "had nothing to do with bringing about the sale and no control over the manner in which it was carried on." (R. 391.) Further, that he did nothing to stifle the bidding, and that "the knowledge of Proctor's interest in the property withheld from Crites could have been of no value to it if disclosed." (R. 391.)

One difficulty with this argument is that it evades the true nature and effect of the agreement between Jones and Simkins. Second, the circuit court of appeals postulates as an absolute certainty a proposition inherently conjectural, namely, that disclosure to petitioner of Proctor's willingness to pay approximately $281,000 for the 11 farms would have been of no benefit to petitioner.

Prior to the foreclosure sales, Prudential Insurance Company could not enter into an agreement to sell the 11 Madison County farms to a prospective buyer except upon the assumption that Prudential would obtain title to all of these farms through the foreclosure sales. For this rea-

son, when the representatives of Prudential were first approached by Jones (on behalf of his principal, Col. Proctor), they told him that they would not be in a position to make a bargain for a sale of the farms until after the foreclosure sales. Jones then approached Simkins, whom he had known for many years, and asked him to "intercede" for him with Prudential Insurance Company, in order to induce the company to agree in advance of the foreclosure sales to sell him the 11 farms for $249,106 net to Prudential. Simkins was able to accomplish what Jones had not been able to accomplish for himself, but Prudential's agreement to sell the farms to Jones was expressly conditioned upon acquisition of title to the 11 farms through the foreclosure sales. At the same time, the agreement of Jones to pay Simkins part of his commission or profit was conditioned upon consummation of the agreed sale by Prudential to Jones. Thus, it became a matter of personal interest to Simkins to make sure that Prudential should become the successful bidder at the foreclosure sales for all of the Madison County farms; and further, that there should be no competitive bidding on any one or more of the farms, or redemption by the equity owner on one or more of the farms, that would prevent consummation of the sale by Prudential to Jones.

Significantly, although Simkins was entitled to no recompense from Jones until the resale by Prudential to Proctor (through Jones) was consummated, which did not occur until August 18, 1933, Jones paid Simkins $500 on July 3, 1933 and $1,000 on July 8, 1933, after the marshal's sale on July 1, 1933, *but before confirmation of the marshal's sale by the court on July 18, 1933.* Not only did Jones want the aid of Simkins to obtain a definite commitment from Prudential prior to the foreclosure sales, so that Jones could stand aside and let Prudential, in effect, bid for him, but he also wanted to make sure that Simkins would make no disclosure prior to confirmation of the marshal's sale

that might put the defendants in position to challenge Prudential's purchase, or to upset Jones' deal. And further, these payments made by Jones to Simkins prior to the confirmation of the marshal's sale indicate the degree of reassurance given by Simkins to Jones that the marshal's sale would be confirmed and Prudential thereby enabled to carry out its deal with Jones.

The circuit court of appeals, it seems to us, deals with Simkins' non-disclosure of his secret alliance with Jones and Prudential as a mere matter of inadvertence; or, at any rate, as a matter of no consequence. It is clear that Prudential was informed not only of the offer made by Jones, but also that Jones was acting as broker or intermediary for a principal whose identity was disclosed to Prudential and of whose financial responsibility Prudential was satisfied; but the petitioner and the district judge were informed, at the most, only that an unrevealed prospective purchaser wanted to buy (at undisclosed price) the 11 farms as a unit, which it was assumed the court could not accomplish.

We contend that this case does not turn on the question whether Simkins was a liquidating receiver or a managing receiver. He and his co-receiver were in charge of the trust property, as the representatives of the court, for the purpose of getting enough money out of the trust property to pay in full the mortgage indebtedness and if possible an overplus to the owner of the equity. All information to this end that came to him while he held office as the court's representative belonged to the court and all parties to the foreclosure proceedings. He could not properly, in relation to the trust estate, split himself into two separate and independent personalities. He could not properly determine for himself that part of the information relating to the trust estate which came to him as associate broker with Jones did not belong to him as receiver, therefore need not

be divulged to the court and all beneficiaries of the receivership.

Is it self-evident, to the point of absolute certainty, as assumed by the circuit court of appeals, that the petitioner as owner of the 11 farms could not have profited by knowledge in advance of the foreclosure sales that a financially responsible buyer was willing to pay approximately $281,000 for the 11 farms as a unit? When it is said that the district court could not order a sale of the 11 farms as a unit, because there were 11 separate decrees of foreclosure, it seems to us that the statement calls for obvious qualifications. It is true, of course, that the district court could not order a sale of the 11 farms as a unit over the objections of the defendants, since this would preclude redemption of one or more of the farms, or perhaps bids on the separate farms more advantageous to the defendants than the bid on the 11 farms as a unit. However, the parties and the interests in all the foreclosure suits were exactly the same; therefore, *if it had been known to the defendants as well as the plaintiff that the 11 farms could be sold together at a price in excess of the mortgage indebtedness,* the court could have postponed the sales in order to give petitioner an opportunity to bargain with the prospective purchaser.

The petitioner, as owner of the 11 farms, was the only party that could have made an unconditional agreement to convey the 11 farms as a unit. At the price of approximately $281,000 paid by Proctor, or even at the net price of $249,106 received by Prudential, a sale of the 11 farms by petitioner would have yielded more than enough to pay the entire mortgage indebtedness and Prudential as mortgagee should have been content with such a result. At the price paid by Proctor, there was generous margin for a normal commission to a broker and all expenses of sale.

It is said in the opinion of the circuit court of appeals that Proctor desired, in addition to a conveyance of the 11 farms as a unit, a warranty deed from Prudential Insurance Company. Manifestly, the reference to a warranty deed could have meant only that Proctor wanted an assured title to the farms and there is nothing in the evidence to indicate that petitioner could not have furnished muniments of title satisfactory to Proctor and his lawyers. As a matter of fact, the sale by Prudential to Proctor was closed on title policies furnished by a title guarantee company and not merely on the deed from Prudential to Proctor's nominee. (R. 249, 250.)

But even if it could be said that the opportunity to bargain with Proctor or his representatives would have been of no avail to the petitioner, the knowledge that at least one buyer was willing to take the 11 farms at a cash price substantially in excess of the appraisals (aggregating $244,080) might well have resulted in further deferment of the sales. The court had already waited a year for better times and a better sale, therefore it is reasonable to assume that the court would have granted further delay if requested by the petitioner. Indeed, there is nothing in the record proceedings to show why the decrees *pro confesso* were entered on May 2, 1933 and the date of sale fixed at July 1, 1933. Not only was the time of sale out of season for farm property, but the time was the darkest hour in the economic history of our nation. It is a matter of judicial notice that in the spring of 1933 the operations of thousands of our banks and other lending institutions came to a complete standstill. If reason existed in 1932 to await a better time of sale, such reason existed in far greater measure in the year 1933, when the legislatures of various states (by the enactment of moratorium laws) and courts of equity (by granting extraordinary remedies, such as limitation of deficiency judgments) were proceeding upon the assumption that the

deflation of real estate values had overshot the mark and that salvage could be saved to the equity owners by a reasonable period of delay.

There is also to be considered the possibility that the petitioner, if fully informed of the dealings between Prudential and Jones, could have demanded from Prudential more equitable treatment. The petitioner would not have been a helpless suppliant, since it was within the power of the petitioner to pay the decree indebtedness on any one of the farms and thus defeat the deal between Prudential and Jones. The opinion of the circuit court of appeals may leave the impression that the petitioner had no assets other than its equity interest in the mortgaged farms (R. 388), but the conveyances made by Henry Crites to petitioner covered all of his assets. (R. 110, 134.)

The assertion by the circuit court of appeals that Proctor's representative would not have been a bidder at the foreclosure sales, if no definite agreement had been reached with Prudential prior thereto, is based solely on the statement by Jones (as a witness in 1937) that he was not authorized to buy the Madison County farms except as an entirety of 4,844 acres. (R. 220.) Davis Harrison testified that Jones was present at the marshal's sale and then stated that his buyer was not a bidder at the sale (R. 269), but at the time of the marshal's sale Jones had already deposited $3,000 earnest money on his agreement to buy the 11 farms from Prudential at net price of $249,106. Since Prudential was the only bidder at the sale, there obviously was no occasion for Jones to enter into the bidding.

Without pursuing further the possible effects of Simkins' non-disclosure, the final answer is that "the incidence of a particular conflict of interest can seldom be measured with any degree of certainty." (*Woods* v. *City National Bank & Trust Co.*, 312 U. S. 262, 268.) Once a fiduciary

places himself in a position where his personal interest conflicts with his fiduciary obligations, speculation should not be indulged to absolve him from blame, nor to find in his disloyalty no injury to the complaining beneficiary.

Jackson v. *Smith*, 254 U. S. 586.

The circuit court of appeals concluded that the principles declared by this court in *Jackson* v. *Smith* are not applicable to the present case because Ambrose was a managing receiver and not a liquidating receiver. In *Jackson* v. *Smith* the receiver of a building association had in his charge, among other assets, a defaulted note for $2700 secured by a mortgage trust deed. The receiver requested the mortgage trustee to advertise the mortgaged land for sale at public auction. At the first sale, the trustee withdrew the property from sale because no adequate bid was made. Prior to the second sale, Smith, Wilson and the receiver (Ambrose) entered into an agreement to purchase the property jointly. Wilson attended the sale and became the purchaser of the property at a bid of $491. In the opinion of this court, by Mr. Justice Brandeis, it is stated:

> "There was no evidence of any improper influence at the sale, to prevent competition, or to close competitive bidding, or to bring about the sale to Wilson in preference to anyone else. On the contrary it affirmatively appears that the sale was fairly conducted; that there was competitive bidding; and that the property was finally knocked down to the highest bidder."

Subsequently the land was resold for $1400. After payment of taxes and expenses, a net profit of $743.68 was divided equally between Wilson, Smith and Ambrose. The amount paid to the mortgage trustee was the amount needed to clear the land of tax encumbrances, therefore Ambrose as receiver got nothing on the note.

The suit that came to this court on appeal was a suit by Jackson, as successor receiver, against Smith and Wilson to recover the profits which had been made by them and Ambrose. The trial court held the defendants liable for the full amount of the profit, $743.68, with interest and costs.* The court of appeals of the District of Columbia reversed the decree of the trial court, but on writ of certiorari this court reversed the judgment of the court of appeals.

Ambrose, be it noted, as receiver of the building association, was not the officer who conducted the sale of the mortgaged land. The sale was conducted by the mortgage trustee under power of sale, free from interference by Ambrose. Furthermore, in contrast with the case at bar, there was competitive bidding at the sale and the receiver had no information about the mortgaged land which gave him or his associates any advantage in the bidding. Nevertheless, this court said as follows:

> "Ambrose had, as receiver, the affirmative duty to endeavor to realize the largest possible amount from the Schwab note. *Baker* v. *Schofield*, 243 U. S. 114, 61 L. ed. 626, 37 Sup. Ct. Rep. 333; *Robertson* v. *Chapman*, 152 U. S. 673, 681, 38 L. ed. 592, 595, 14 Sup. Ct. Rep. 741. To this end it was his duty to endeavor to have the land, when sold under the trust deed, bring the largest possible price. *J. H. Lane & Co.* v. *Maple Cotton Mill*, 146 C.C.A. 415, 232 Fed. 421. When he agreed with Smith and Wilson to join in the purchase if Wilson should become the successful bidder, he placed himself in a position in which his personal interests were, or might be, antagonistic to those of his trust. *Michoud* v. *Girod*, 4 How. 503, 552, 11 L. ed. 1076, 1098. It became to his personal interest that the purchase should be made by Wilson for the lowest possible price. The course taken was one which

* Ambrose, as receiver, was surcharged in his accounts with the amount of the profits, but did not appeal. 48 App. D. C. 565.

a fiduciary could not legally pursue. *Magruder* v. *Drury*, 235 U. S. 106, 119, 120, 59 L. ed. 151, 156, 35 Sup. Ct. Rep. 77. Since he did pursue it and profits resulted, the law made him accountable to the trust estate for all the profits obtained by him and those who were associated with him in the matter, although the estate may not have been injured thereby. *Magruder* v. *Drury*, 235 U.S. 106, 59 L. ed. 151, 35 Sup. Ct. Rep. 77. And others who knowingly join a fiduciary in such an enterprise likewise become jointly and severally liable with him for such profits. *Emery* v. *Parrott*, 107 Mass. 95, 103; *Zinc Carbonate Co.* v. *First Nat. Bank*, 103 Wis. 125, 134, 74 Am. St. Rep. 845, 79 N.W. 229; *Lomita Land & Water Co.* v. *Robinson*, 154 Cal. 96, 18 L.R.A. (N.S.) 1106, 97 Pac. 10. Wilson and Smith are therefore joinfly and severally liable for all profits resulting from the purchase; the former, although he had no other relation to the estate; the latter, without regard to the fact that he was also counsel for the receiver."

Cases cited by circuit court of appeals.

The opinion of the circuit court of appeals refers to *Starkweather* v. *Jenner*, 216 U.S. 524, 54 L. ed. 602, *Turner* v. *Kirkwood* (C.C.A. 10) 49 F. 2d 590, *Reeves* v. *Crum*, 97 Okla. 293, *Anderson* v. *Messinger* (C.C.A. 6), 146 Fed. 929, and *Beckman* v. *Machinery & Supply Co.*, 9 Oh. App. 275. These cases, we submit, do not support the conclusion reached by the circuit court of appeals in this case. In *Starkweather* v. *Jenner* the question was whether individual owners of fractional beneficial interests in syndicate property could purchase the syndicate property at a public foreclosure sale ordered by the mortgagee and conducted by the mortgage trustees, and the answer was that such purchase could be made without violation of the fiduciary relationship between tenants in common, "all deceit and fraud out of the way." There was no element in the case of collusion between the mortgagee and the purchaser; no withholding of material information

by one tenant in common from his co-tenants. The complaining co-tenant had himself been the high bidder at the prior sale, but found himself unable to comply with the terms of the sale. At the sale of which the appellant complained, he and others made competitive bids and "although he says he intended to give the syndicate the benefit of his purchase, he said nothing of it, and seemingly sought to secure himself as best he could in the apparent wreck of the joint enterprise." The appellant did not file his bill of complaint until more than four years after he learned that Jenner had made his bid for the benefit of himself and certain other members of the syndicate, during which time there was a large appreciation in the value of the property, therefore *laches* was invoked as another ground for refusing to disturb the sale.

Turner v. *Kirkwood* (C.C.A. 10), 49 F. 2d 590 was an action brought by Effie T. Kirkwood against her brother Fred E. Turner, individually and as administrator of the estate of Julia A. Turner, their deceased mother. The mother was the owner of certain real estate, of which she deeded an undivided one-half interest to her son Fred. The real estate was then conveyed to a corporation, Old Homestead Company, and the 2,000 shares of capital stock were divided equally between mother and son (except two shares issued to others). In 1909 Julia A. Turner mortgaged certain real estate and pledged her shares of Homestead Company stock to the National Bank of Commerce in St. Louis to secure an indebtedness of approximately $450,000 owed to the bank by her son Clarence W. Turner. The contract of pledge provided that the pledgor should be entitled to all dividends on the stock during her lifetime and that the pledge should not be foreclosed until 60 days after her death. In 1914 Julia A. Turner and her son Fred incorporated the Eureka Realty Company with a capital stock of 8,000 shares, substantially all of which were issued in exchange for property of the Homestead

Company valued at $200,000. The directors of Homestead Company then declared a divided of the Eureka Company stock: to Julia A. Turner and Fred E. Turner, each 3,996 shares. Julia A. Turner transferred her 3,996 shares to her son Fred, one-half to him individually and the other half in trust for his sister, Mrs. Kirkwood. The mother died April 9, 1915 and her son Fred was appointed administrator of her estate.

The bank commenced a suit against the two corporations and various individual defendants to foreclose the mortgage of real estate and the pledge of Mrs. Turner's 999 shares of Homestead Company stock, also to obtain a judgment against Fred E. Turner, individually and as administrator, for the conversion of the 3,996 shares of Eureka Company stock paid to Mrs. Turner as a dividend. The bank obtained a decree of foreclosure, also a money judgment against Fred E. Turner, individually and as administrator, for $157,982.89 on account of the conversion of the Eureka Company stock paid to the decedent as a dividend.

The indebtedness of Clarence W. Turner to the bank, at the time of said decree, amounted to $298,596.58. Fred E. Turner and the bank then entered into a compromise agreement which provided for ultimate payment to the bank of $220,000. In part this agreement provided that the bank should cause the decree in the foreclosure suit to be modified by eliminating the personal judgment against Fred E. Turner, in lieu thereof Turner to deliver to the bank the 3,996 shares of Eureka Company stock paid to the decedent as a dividend by the Homestead Company; and further, that the bank should cause the stock and real estate to be sold pursuant to the modified decree, the bank to buy in the stock and real estate at the foreclosure sale and transfer the same to Turner (unless someone else should carry the bidding beyond certain stipulated sums).

This program was carried out. The foreclosure sale was made by a commissioner appointed by the court, the bank purchased the stock and real estate, then transferred the same to Turner.

Since the indebtedness of Clarence W. Turner to the bank exceeded the value of the pledged stock and mortgaged real estate, there remained no surplus for the decedent's estate. Fred E. Turner, both individually and as administrator, was absolved from liability on account of the conversion of the decedent's 3,996 shares of Eureka Company stock, which went back to the Homestead Company. The litigation left undisturbed the 3,996 shares of Eureka Company stock which Fred E. Turner had himself received as a dividend.

Mrs. Kirkwood did not learn of the compromise agreement between her brother and the bank until after it had been consummated. She then brought two suits, which were consolidated for trial, one for an accounting and one to enforce the trust created by her mother for her benefit in the shares of stock of Eureka Company (*i.e.*, one-half the 3,996 shares owned by her mother). The trial court adjudicated that Mrs. Kirkwood was entitled to receive property equivalent to a one-fourth interest in the assets of the Eureka Company and a one-half interest in the assets of the Homestead Company, subject to payment by her of one-half the amount paid by her brother to the bank. On the appeal, the upper court recognized that the defendant was in effect the purchaser of the stock and real estate sold at the foreclosure sale, then considered whether such purchase was a violation of his duties as fiduciary. It was apparently undisputed that the indebtedness to the bank was in excess of the value of the security. The estate of Julia A. Turner did not have the funds needed to redeem the property from the mortgage and pledge.

The foreclosure sale was held in a proceeding to which Fred E. Turner was a party as defendant, but in which he had no official capacity. At the time of the foreclosure sale, although Fred E. Turner held title as administrator to the property sold, "such property had passed from the jurisdiction of the probate court and from the control of the administrator and was under the jurisdiction of the United States district court in the foreclosure proceeding." The mere fact that he held office as administrator did not preclude him from becoming the purchaser at the foreclosure sale. But this did not dispose of the case. The question still remained whether the defendant had placed himself in a position where his personal interest conflicted with his interest as administrator and as trustee. In the consideration of this question, the court analyzed the compromise agreement made by Turner with the bank and found that Turner was faced with a personal judgment for $157,982.89, on account of the conversion of the 3,996 shares of Eureka Company stock paid by Homestead Company to Julia A. Turner as a dividend; that this was a liability in tort for which Turner could not enforce contribution or secure indemnity from his mother's estate, or from Mrs. Kirkwood as to the shares of which she was *cestui que trust*; that when Turner agreed to permit the 3,996 shares of Eureka Company stock formerly owned by his mother to be sold by the bank in the foreclosure suit, he was using for his own personal benefit the half portion of the shares held by him as trustee.

As to the real estate and the shares of stock of Old Homestead Company, to which Turner held legal title as administrator, but which had passed out of his control and had become subject to sale in the foreclosure suit through no act or omission on his part, the court held that he did not place himself in a position of conflicting interest by purchasing this property at the foreclosure sale (*i.e.*, from the bank, as purchaser at the foreclosure sale). But as to

the shares of the Eureka Company, which he held as trustee and delivered to the bank to be sold under the decree of foreclosure, he served his self interest in opposition to his duty as trustee, therefore was liable to account.

The decision in *Turner* v. *Kirkwood* falls far short of holding that a fiduciary is always free to purchase the trust property, or have an interest in such purchase, if the sale happens to be a judicial sale conducted by a commissioner or marshal. The question still remains whether, in relation to such sale, the fiduciary has placed himself in a position where his personal interest is in conflict with his duty as fiduciary.

The case of *Reeves* v. *Crum*, 97 Okla. 293, 225 Pac. 177, is in no way analogous to the case at bar, likewise *Anderson* v. *Messinger* (C.C.A. 6), 146 Fed. 929. *Beckman* v. *Machinery & Supply Co.*, 9 Oh. App. 275, dealt with a private purchase of the mortgaged property by the former receiver from the purchaser at the foreclosure sale, initiated after the sale had been confirmed and the property had passed from the custody of the receiver to that of the new owner.

Reverting to *Starkweather* v. *Jenner*, 216 U.S. 524, there is a decided difference in the obligations of co-tenants to one another and the obligations of a receiver to the beneficiaries of the receivership estate. Tenants in common have a proprietary interest in the common property and the right to protect such interest, if they act without imposition on their co-tenants. A receiver has or should have no personal interest in the trust property to protect. The relation of tenants in common to the court is that of parties litigant. A receiver owes his standing in the case to the court's order of appointment and is an officer of the court. By virtue of his office the receiver obtains custody and control of the trust property, a possession with which no one can interfere.

Other cases.

In *Jackson* v. *Smith*, 254 U.S. 586, to remind the court, responsibility for the conduct of the sale rested with the mortgage trustee and not with the receiver. On this ground, the Court of Appeals of the District of Columbia held that the receiver could participate in the purchase made by his associate at the trustee's sale. But this court held to the contrary.

Other cases in which a receiver participated in a purchase of the trust property at a sale conducted by another, but was nevertheless held accountable, are noted as follows:

Nugent v. *Nugent* (1907) 2 Ch. 292, 76 L.J. Ch. 614, affd. (1908) 1 Ch. 546, 77 L.J. Ch. 271:—sale by a mortgage trustee and purchase by receiver appointed to collect rents.

In re Sheets Lumber Co., 52 La. Ann. 1337, 27 So. 809:—sale by sheriff under court decree and purchase of an interest in one parcel of real estate by the receiver and another.

Shadewald v. *White*, 74 Minn. 208, 77 N. W. 42:— purchase by receiver of certificate of sale from the purchaser at foreclosure sale conducted by sheriff.

Donahue v. *Quackenbush*, 62 Minn. 132, 64 N.W. 141; 75 Minn. 43, 77 N. W. 430:—sale by sheriff on execution writ (in a proceeding other than that in which the receiver was appointed) and purchase by receiver; resale by the receiver to the defendant Quackenbush. Held, defendant was not a purchaser of the property in good faith and was accountable for its full value.

Cook v. *Martin*, 75 Ark. 40, 86 S.W. 625:—purchase of receivership property by the receiver (for his wife) from Mrs. Gaines, who in turn purchased the property from Cameron, who in turn purchased the property at an execution sale to enforce the lien of a judgment against the property. Held, that the receiver's

wife should be divested of all interest in the property, upon repayment of the amount expended by her. [On rehearing, held that the creditors had made an election to reject the benefit of the receiver's purchase, by pursuing an inconsistent course.]

II.

The growing crops.

The agreement of sale made between Prudential Insurance Company and Jones prior to the foreclosure sales included the receivers' interest in the growing crops together with the land. When Simkins engineered this agreement, he knew that it could not be consummated and that he could receive no personal reward unless Prudential became the owner of the receivers' interest in the growing crops. No matter that Prudential ultimately paid to the receivers a fair price for their interest in the crops (of which payment, after the low bids made by Prudential for the real estate, Prudential was itself the sole beneficiary), it is clear that prior to the foreclosure sales Simkins had placed himself in an indefensible position of conflicting interest.

That Simkins' self interest became dominant and blinded him to his duty as receiver, there can be no doubt. He did not remain impartial between the plaintiff and the defendants. He knew—and knew that Prudential knew—that Proctor (through Jones) stood committed to buy the Madison County farms at a price substantially in excess of the entire mortgage indebtedness. He knew that the defendants did not have this vital information; but even more, that if he made full disclosure to the defendants and to his co-receiver and to the court, that this would defeat his chances to share in Jones' commission or profit. He chose to take the course dictated by self interest and kept the defendants in the dark, leaving the way clear to Pru-

dential to bid in the 11 farms at a price far below the amount agreed to be paid for these farms by Jones, who in turn was acting as intermediary for a buyer committed to pay even more.

Measure of recovery.

Regarding the measure of recovery against Simkins for his breach of trust, the rule is established by the decision of this court in *Jackson* v. *Smith*, 254 U.S. 586, as above quoted at page 25. Simkins is liable not only for the profit he himself realized out of the transaction, but also for the profits realized by Jones and Prudential Insurance Company.

In addition, if the court concludes that Simkins was a faithless receiver, he should be surcharged with all fees received from the estate.

III.

The fee-splitting agreement between Simkins and Ingalls.

By the order of the district court entered January 17, 1933 Simkins was allowed $250 on account for his services as receiver and Ingalls $250 for his services as counsel for the receiver. Subsequently Simkins received additional compensation of $1800, without formal court order. April 8, 1941 the district court made an additional allowance of $2200 to Ingalls for services as attorney for the receivers.

The petitioner excepted to all credits in the receivers' account for fees to either Simkins or Ingalls, because of their agreement to split all fees received in this case. On this subject, the circuit court of appeals said:

> "The master found the fee-splitting arrangement reprehensible, and so do we. The court had no infor-

> mation in respect to it and the agreement invaded its authority to fix the fees of receivers and counsel as their respective contributions to the receivership activities might require." (R. 392.)

The opinion then goes on to discuss the conflicting loyalties of Harrison and Ingalls, of record as attorneys for the plaintiff and as attorneys for the receivers, but says nothing more about the status of Simkins. However, the court concludes that no credits should be allowed to the receivers for additional attorney fees to either Harrison or Ingalls (each of whom had already received $250 on account of services as counsel for the receivers). Simkins, who received half of the retainer fees paid by Prudential Insurance Company to Ingalls, and on the other hand paid to Harrison $1,000 out of his own fees (and rewards received from Jones), was permitted to retain not only the $250 originally allowed by the court but also the $1800 paid to himself, without formal court order.

It is suggested in the opinion of the circuit court of appeals that the disallowance of additional fees to either Harrison or Ingalls is made to "vindicate the proprieties." Presumably, this refers to the proprieties to be observed by lawyers as officers of the court. It seems to us that the same proprieties apply to a lawyer who accepts appointment as receiver. We are at a loss to find any logical basis for the disallowance of additional fees to either Harrison or Ingalls, while permitting Simkins to retain the $250 allowed to him by the court and the additional $1800 paid to himself.

Incidentally, it is suggested in the opinion of the circuit court of appeals that the petitioner is at fault for standing by and permitting Harrison and Ingalls to represent both the plaintiff and the receivers. Perhaps the petitioner should have foreseen that the lawyers would some day find themselves in a position of conflicting interests. But

of the fact that Harrison first approached Simkins, then Simkins selected Ingalls as local attorney, and all three of them secretly agreed what should be their respective roles in the foreclosure proceedings, the opinion of the circuit court of appeals says nothing. On the writ of certiorari granted by this court, the sole issue respecting fees is whether or not Simkins should be ordered to repay the $2,050 received by him as receiver's fees.

* * * * * * * *

In conclusion, we urge that the judgment of the circuit court of appeals should be reversed and the cause remanded to the district court with directions to surcharge the receiver Simkins with (a) all payments received by Simkins from Jones; (b) the commission or profit received by Jones; (c) the amount received by Prudential in excess of the decree indebtedness (or, in the alternative, the amount by which the appraised value of the Madison County farms exceeded the decree indebtedness), and (d) all fees received by Simkins as receiver.

Respectfully submitted,

ISAAC E. FERGUSON
77 West Washington Street
Chicago 2, Illinois,
attorney for petitioner.

NATHAN HAFFENBERG
JOSEPH ROSENBAUM
100 West Monroe Street
Chicago 3, Illinois,
of counsel.